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Applicability of the Exclusionary Rule to Illegal OSHA Inspections: Savina Home Industries, Inc. v. Secretary of Labor

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Case Comments

Applicability of the Exclusionary Rule to Illegal OSHA Inspections: *Savina Home Industries, Inc. v. Secretary of Labor*

Pursuant to the apparent authority granted under section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA),[1] an OSHA compliance officer conducted a warrantless inspection[2] of a commercial construction site of Savina Home Industries, Inc. (Savina).[3] During this inspection several violations of OSHA safety regulations were discovered. The Secretary of Labor cited Savina for these violations and proposed penalties totalling $470.[4] After Savina contested the citation, the Secretary issued a formal complaint.[5] The case was heard before an administrative law judge who declined to hear Savina's constitutional arguments.[6] The judge affirmed most of

1. 29 U.S.C. §§ 651-678 (1976).

2. On its face OSHA does not require compliance officers to procure search warrants prior to conducting safety inspections on private property. Section 8(a) of the Act provides:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
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> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

29 U.S.C. § 657(a) (1976).

3. Savina, a building firm, was employed as a general contractor. Savina Home Indus., Inc. v. Secretary of Labor, 594 F.2d 1358, 1360 (10th Cir. 1979).

4. *Id.*

5. *Id.* The Act requires the OSHA Review Commission to allow a contesting employer an opportunity for a hearing. 29 U.S.C. § 659(c) (1976). This hearing must conform with the procedural requirements for adjudicatory hearings set forth in the Administrative Procedure Act (APA), 5 U.S.C. § 554 (1976). *See* 29 U.S.C. § 659(c) (1976).

6. 594 F.2d at 1360. Savina raised a number of constitutional arguments, including several claims that OSHA and the acts of the Secretary authorized by OSHA violated its constitutional right to due process of law, *see, id.* at 1365-66,

the citations and ordered that a reduced penalty of $275 be imposed.[7] The OSHA Review Commission affirmed the administrative law judge's order.[8] Savina appealed this final order to the Court of Appeals for the Tenth Circuit,[9] contending that the evidence upon which the order was based was inadmissible because it was obtained through an illegal search.[10] While this appeal was pending, the Supreme Court held in *Marshall v.*

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to confront and cross-examine witnesses, and to be tried before a jury. *See id.* at 1366-67. Savina also argued that OSHA amounted to an unconstitutional delegation of legislative and judicial authority and that the Act was unconstitutionally vague. *See id.* at 1367. Although the court disposed of most of these claims on grounds of lack of standing, *see id.* at 1366-67, two due process claims involving technically deficient notice were denied on substantive grounds. *See id.* at 1365-66. Savina's strongest constitutional argument was that the evidence of its violations was inadmissible because it was obtained through a warrantless search in violation of the fourth amendment. *See id.* at 1361-65.

Although the administrative law judge believed that he lacked authority to adjudicate the constitutionality of OSHA—"the very Act that gave [the OSHA Review Commission] its authority"—*see id.* at 1360, Savina may have been obligated to give notice of its constitutional arguments by raising them at the administrative hearing level in order to raise them before the court of appeals. OSHA stipulates: "No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 660(a) (1976). *See* 594 F.2d at 1361 n.3. *See generally* Divesco Roofing & Insulation Co., [1973-1974] OCC. SAFETY & HEALTH DEC. (CCH) ¶ 16,443 (OSHA Review Comm'n 1973); *see also* Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 688-89 (9th Cir. 1978) (finding "extraordinary circumstances").

In *Savina*, the Secretary of Labor argued that Savina's fourth amendment challenge was not properly before the court because Savina failed to raise the lack of consent issue at the administrative hearing. 594 F.2d at 1361 n.3. The Tenth Circuit panel, however, dismissed this argument by finding the allegation that the inspection was conducted in violation of the fourth amendment to be sufficient. Because OSHA procedures did not allow Savina to fully develop its argument before the administrative judge, the court found Savina's general objection at the adminstrative hearing adequate to permit consideration of this challenge on appeal. *Id.*

7. 594 F.2d at 1360. The circuit court's opinion does not state the reason for the reduction in the penalty.

8. *Id.* at 1360-61. Any member of the OSHA Review Commission has authority to direct that the administrative law judge's order be reviewed by the full Commission. Administrative Law Judges—Civil Service, Publ. L. 95-251, § 2(a)(7), 92 Stat. 183 (amending 29 U.S.C. § 661(i) (1976)). The Commission has the power to modify, affirm, or vacate the Secretary's citation or proposed penalty following the initial, fact-finding hearing conducted by the administrative law judge. 29 U.S.C. § 659(c) (1976). If no Commission member directs review of the administrative law judge's order within thirty days, this order becomes the final order of the Commission. Administrative Law Judges—Civil Service, Publ. L. 95-251, § 2(a), 7, 92 Stat. 183 (amending 29 U.S.C. § 661(i) (1976)).

9. Any person adversely affected by an order of the OSHA Review Commission may obtain judicial review in a United States court of appeals by filing within sixty days a petition that the order be modified or set aside. *See* 29 U.S.C. § 660(a) (1976).

10. 594 F.2d at 1361-65. *See also* note 6 *supra.*

Barlow's, Inc.[11] that OSHA's warrantless inspection procedures violated the fourth amendment prohibition of unreasonable searches.[12] Although the Tenth Circuit panel ultimately affirmed the OSHA Review Commission's order on the ground that any exclusionary rule that might accompany *Barlow's* was not retroactively applicable,[13] the panel first concluded that the

11. 436 U.S. 307 (1978).

12. *See id.* at 324-325. The *Barlow's* Court held that "[OSHA § 8(a)] is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent." *Id.* at 325. *See* notes 15 & 41 *infra* and accompanying text. *But see* 436 U.S. at 325-339 (Stevens, J., dissenting, joined by Blackmun & Rehnquist, J.J.).

13. In holding that the fourth amendment exclusionary rule would not apply retroactively, the Tenth Circuit panel employed the test for retroactivity of extensions of the fourth amendment exclusionary rule announced by the Supreme Court in United States v. Peltier, 422 U.S. 531, 539 (1975). *See* 594 F.2d at 1363. An earlier, less rigorous, test for the retroactivity of "new doctrines of law" is still applied in most circumstances. *See* Stovall v. Denno, 388 U.S. 293, 296-97 (1967) (stating the traditional standard and citing cases). *See generally* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1558-67 (1975). Following *Peltier*, however, it is no longer applied in retroactivity cases involving the fourth amendment exclusionary rule. Under the *Peltier* test the extension of the exclusionary rule will apply retroactively only when one of its two major purposes—the deterrence of similar official misconduct in the future and the preservation of judicial integrity, *see* notes 51-52 *infra*—would be significantly furthered by such application. *See* United States v. Peltier, 422 U.S. at 539. The *Peltier* Court concluded that both of these considerations depend on the good faith of the offending officer and the reasonableness of that faith. *Id.* at 537. If the officer reasonably believed that his actions were constitutional, then the exclusion of improperly obtained evidence will not further the rule's deterrent purpose because the "deterrent purpose . . . necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct." *Id.* at 540 (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)). Similarly, judicial integrity would not be offended by the admission of evidence obtained through good faith searches, because the use of such evidence does not make the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Elkins v. United States, 364 U.S. 206, 223 (1960), *quoted in* United States v. Peltier, 422 U.S. 531, 536 (1975). In essence, the "*Peltier* test" provides that the exclusionary rule is non-retroactive in fourth amendment cases unless the officers involved in the illegal search knew or should have known that their actions were unconstitutional. *See* 422 U.S. at 542. *See generally* Note, *Retroactivity and the Exclusionary Rule: When do the Policies Underlying the Exclusionary Rule Warrant Its Retroactive Application?*—United States v. Peltier, 13 AM. CRIM. L. REV. 317 (1975).

Employing the *Peltier* test for retroactivity, the Tenth Circuit panel concluded that at the time of the inspection in *Savina*, the state of the law "was not such as to charge the inspector with knowledge of the unconstitutionality of a warrantless search." 594 F.2d at 1364. Once this conclusion of "good faith" was reached, the *Peltier* test required that any exclusionary rule demanded by *Barlow's* be applied only prospectively.

The *Savina* court, however, may have misapplied the *Peltier* definition of a reasonable basis for a good faith belief by the offending officer in that the extension of the fourth amendment in *Savina* was more clearly foreshadowed than extension in *Peltier*. In finding a good faith basis for the Border Patrol's belief in the constitutionality of the roving border search involved in *Peltier*,

exclusionary rule would apply to OSHA proceedings violative

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the Supreme Court noted that prior to its ruling in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (probable cause held necessary for roving border searches of vehicles), there had been no federal court decisions indicating that such searches were impermissible. *See* 422 U.S. at 540-42. Indeed, all of the appellate court decisons at the time of the search in *Peltier* supported the legality of such a search. *See* United States v. Thompson, 475 F.2d 1359, 1362-63 (5th Cir. 1973); United States v. Almeida-Sanchez, 452 F.2d 459, 460-64 (9th Cir. 1970); Roa-Rodriques v. United States, 410 F.2d 1206, 1208 (10th Cir. 1969). The only Supreme Court precedent that supported the contrary view was over fifty years old and was very specific in its application to such a search. *See* Caroll v. United States, 267 U.S. 132, 155-56 (1925) (although the Court held that probable cause was needed for the search of a car, there was some uncertainty as to its applicability to border searches). In contrast, at the time of the search involved in *Savina*, no appellate court had considered the constitutionality of OSHA's authorization of warrantless searches. Although the only federal district court decision that had considered the issue, Brennan v. Buckeye Indus., Inc., 374 F. Supp. 1350, 1354 (S.D. Ga. 1974), supported the constitutionality of OSHA's warrantless inspections, the rationale of its opinion was severely undermined by the Supreme Court only one month later. *See* Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 863 (1974) (Court approved a warrantless administrative search, because it fell within a warrant exception, but expressly reaffirmed certain cases that *Buckeye* considered to be of no further vitality).

Thus, at the time it concluded its warrantless search of Savina's premises, the Department of Labor could rely only on the language of section 8(a) of OSHA, *see* note 2 *supra*, and *Buckeye*, in support of the constitutionality of its practices. The evidence against a constitutional interpretation was the literal language of the fourth amendment and the Supreme Court decision that destroyed *Buckeye's* precedential foundations. On the basis of this information, the Secretary of Labor elected to continue to conduct warrantless searches under OSHA. On the basis of this same information, however, the next eight trial judges to consider the issue unanimously agreed that warrantless OSHA inspections were unconstitutional. *See* Barlow's Inc. v. Usery, 424 F. Supp. 437, 442 (D. Ida. 1977), *aff'd sub nom.* Marshall v. Barlow's Inc., 436 U.S. 307 (1978); Marshall v. Reinhold Constr., Inc., 441 F. Supp. 685, 695 (M.D. Fla. 1977); Morris v. Department of Labor, 439 F. Supp. 1014, 1020 (S.D. Ill. 1977); Empire Steel Mfg. v. Marshall, 437 F. Supp. 873, 881 (D. Mont. 1977); Marshall v. Chromalloy Am. Corp., 433 F. Supp. 330, 332-33 (E.D. Wis. 1977), *aff'd sub nom. In re* Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335 (7th Cir. 1979); Usery v. Centrif-Air Mach. Co., 424 F. Supp. 959, 960-62 (N.D. Ga. 1977); Brennan v. Gibson's Products, Inc., 407 F. Supp. 154, 162 (E.D. Tex. 1976), *vacated* 589 F.2d 668 (5th Cir. 1978); Dunlop v. Hertzler Enterprises, 418 F. Supp. 627, 630 (D. N. Mex. 1976). *See generally* Note, *Warrantless Nonconsensual Searches Under the Occupational Safety and Health Act of 1970*, 46 GEO. WASH. L. REV. 93 (1977). Although these later rulings were announced after the OSHA inspection in *Savina*, and could not have alerted the Secretary to the probable need for warrants, they weaken any argument that the Secretary relied on clear constitutional law. In light of the near unanimity with which district courts anticipated *Barlow's*, the reasonableness of the Secretary's assumption that OHSA's warrantless search procedure was constitutional is open to doubt.

Where such important constitutional principles are at stake, the better approach may have been to assume that the Department of Labor, which was a party to all of these cases, had the same foresight as the eight trial judges. Allowing the Department of Labor to find a safe harbor in a single trial court opinion, as *Savina* may be taken to imply, would certainly be a step toward

of the *Barlow's* standard. *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358 (10th Cir. 1979).[14]

The most important question considered by the *Savina* court was whether the exclusionary rule applies in OSHA proceedings to evidence obtained in violation of the *Barlow's* warrant requirements.[15] This issue has its origins in the fourth amendment's failure to provide a method to enforce its safeguards.[16] Although since 1791 the fourth amendment has been held to guarantee freedom from arbitrary or unreasonable government searches, it fails to provide sanctions when the government violates this right. In the absence of such sanctions,

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converting *Peltier's* already rigorous requirements for retroactivity into a per se rule of non-retroactivity in fourth amendment exclusionary rule cases.

14. The Tenth Circuit panel undoubtedly asserted this conclusion as a belief rather than a holding because of the Supreme Court's recent directive to lower courts to attempt to dispose of motions to suppress evidence under the fourth amendment on grounds of non-retroactivity before considering the merits of a novel exclusionary rule claim. *See* Bowen v. United States, 422 U.S. 916, 920-21 (1975).

The *Savina* court's discussion of the applicability of the exclusionary rule sanctions to evidence obtained in warrantless administrative searches assumes that the *Barlow's* constitutional warrant requirement would itself retroactively prohibit such searches. Because *Barlow's* was itself a suit for prospective relief (no search had yet taken place), the Supreme Court's opinion in *Barlow's* did not indicate whether the *Barlow's* warrant requirement extended to pre-*Barlow's* searches. The *Savina* court did not decide whether the warrant requirement had such retroactive applicability and noted only that in Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 688-89 (9th Cir. 1978), the Ninth Circuit had made such a determination based on the fact that the Supreme Court had remanded several pending cases for reconsideration in light of *Barlow's*. *See* 594 F.2d at 1361-62 & n.4.

15. Under the *Barlow's* requirements, the Secretary of Labor may obtain an *ex parte* warrant merely by proving "that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." 436 U.S. at 320 (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)).

To obtain such a warrant, the Secretary need not show probable cause that OSHA regulations are being violated on the particular premises to be searched. *Id.* A nonconsensual OSHA search performed without this *ex parte* warrant, however, is prohibited by the fourth amendment. *Id.* at 325. *See generally* Note, Marshall v. Barlow's, Inc. *and the Warrant Requirement for OSHA "Spot Check" Inspections*, 15 IDAHO L. REV. 187 (1978); Comment, *Searches by Administrative Agencies After* Barlow's *and* Tyler*: Fourth Amendment Pitfalls and Short-Cuts*, 14 LAND & WATER L. REV. 207 (1979); A. Obadal, The *Barlow's* Decision: Are Its Guidelines Mere Formalities? (1978) (unpublished study on file at the National Legal Center, Washington D.C.).

16. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

fourth amendment rights formerly existed more often in word than in reality.[17] The Supreme Court, however, eventually formulated an exclusionary rule[18] whereby evidence obtained through searches or seizures conducted in violation of the fourth amendment is, with some exceptions, inadmissible.[19]

The scope of the fourth amendment exclusionary rule's application has not yet been precisely defined. Although it is clear that the rule applies in criminal trials,[20] its applicability in noncriminal adjudications, such as the administrative hearing involved in *Savina*, is unsettled.[21] The Supreme Court has re-

17. That police practices involving illegal searches and seizures were widespread prior to the formulation of the exclusionary rule may be inferred from the Supreme Court's reference to "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions." Weeks v. United States, 232 U.S. 383, 392 (1914). In view of these police practices the Court has concluded that failure on the part of the courts to exclude unconstitutionally seized evidence would be to "grant the right but in reality to withhold its privilege and enjoyment." Mapp v. Ohio, 367 U.S. 643, 655 (1961).

18. *See generally* 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2184, at 31 (3d ed. 1940); text accompanying notes 28-31 *infra*. The Supreme Court did not explicitly create the exlusionary rule until Weeks v. United States, 232 U.S. 383 (1914). In *Weeks* the defendant's home had been ransacked without a warrant by municipal police assisted by a United States marshall. The evidence from this search was used to convict Weeks of illegally using the federal mails to send lottery tickets. The Court excluded the evidence from the trial because of the unconstitutional means used to obtain it. *Id.* at 386-89.

Since the fourth amendment was then interpreted by the Court to apply only to the federal government, the *Weeks* exclusionary rule applied only in the federal courts. 232 U.S. 383. *See* Barron v. Baltimore, 32 U.S (7 Pet.) 243, 247 (1833).

In Wolf v. Colorado, 338 U.S. 25 (1949), however, the Supreme Court held that the "core" of the fourth amendment was applicable to the states through the due process clause of the fourteenth amendment. *Id.* at 27-28. This meant that the fourth amendment's restrictions were applicable to state officials. Application of the exclusionary rule, however, remained a matter for judicial discretion in state courts because it was not a constitutional right. *Id.* at 28-33. Eventually, in 1961, the Supreme Court held the exclusion of evidence resulting from violation of the fourth amendment to be required in state courts. Mapp v. Ohio, 367 U.S. 643, 655 (1961). Cases subsequent to *Mapp*, however, have reasserted that the fourth amendment exclusionary rule is not a constitutional right. *See* note 85 *infra*.

19. Weeks v. United States, 232 U.S. 383, 398 (1914).

20. The Supreme Court's decisions in which the fourth amendment exclusionary rule has been applied are either criminal cases or cases classified as quasi-criminal. *See* United States v. Janis, 428 U.S. 433, 443-47 (1976).

21. *Compare id.* at 447 ("the Court never has applied [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state") *with* notes 36, 102 *infra* (describing civil applications of the rule). *See generally* Note, *Constitutional Exclusion of Evidence in Civil Litigation*, 55 VA. L. REV. 1484 (1969); Comment, *The Applicability of the Exclusionary Rule to Civil Cases*, 19 BAYLOR L. REV. 263 (1967).

cently applied the warrant requirements of the fourth amendment to administrative inspections conducted by government agents,[22] but has not yet ruled whether the exclusionary rule applies to evidence obtained through such warrantless searches.[23]

Lower courts have often stated that the exclusionary rule simply does not apply in civil cases.[24] Yet in two cases involving civil forfeiture proceedings the Supreme Court has held inadmissible evidence obtained in violation of the fourth amendment. The first case, *Boyd v. United States*,[25] decided in 1886, involved a constructive search and seizure of an importer's business records by customs officials. The records were then used in a civil forfeiture proceeding to prove that the defendants had attempted to defraud the government of import duties.[26] The trial court awarded forfeiture of the goods in question to the government. In reversing, the Supreme Court justified exclusion of the evidence by comparing civil forfeiture proceedings to criminal cases.[27] Justice Bradley, for the Court, stated: "[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their na-

22. *See* See v. Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967). In *Camara*, the Court overruled Frank v. Maryland, 359 U.S. 360 (1959), holding that inspections of private residences by administrative agencies must ordinarily be conducted pursuant to a search warrant. 387 U.S at 528. In *See*, the Court extended this protection to nonpublic business premises. 387 U.S. at 545-46. *See* note 15 *supra*.

In two cases, however, the Supreme Court has allowed exceptions to its holdings in *Camara* and *See*. United States v. Biswell, 406 U.S. 311 (1972) (upholding a warrantless search authorized under the Gun Control Act of 1968, 18 U.S.C. §§ 921-928 (1976)); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (upholding the warrantless search of the business premises of a liquor dealer authorized by 26 U.S.C. §§ 5146(b), 7606 (1976)). The Court allowed these exceptions to the expanded fourth amendment warrant requirements because the liquor and firearm industries both have a long history of pervasive governmental regulation. In the Court's view, when a person chooses to engage in one of these businesses, he has a lesser expectation of privacy. 406 U.S. at 315-16; 397 U.S. at 76-77. *See* Marshall v. Barlow's Inc., 436 U.S. 307, 313 (1978). In *Barlow's*, however, the Court held that neither the *Biswell* nor the *Colonnade* exception to the administrative search warrant requirements applied to OSHA inspections. 436 U.S. at 313-15.

23. Neither *Barlow's*, nor *See*, nor *Camara*, dealt with the question of excluding evidence obtained by an illegal search.

24. *See* note 36 *infra*. *See generally* secondary sources cited in note 21 *supra*.

25. 116 U.S. 616 (1886).

26. *Id.* at 618; *see* note 18 *supra*.

27. 116 U.S. at 634. In *Boyd* the government could have sought both criminal and civil penalties but limited its demand to civil forfeiture of the tax-delinquent goods. *Id.*

ture criminal."[28] The Court's next application of the fourth amendment exclusionary rule in a civil forfeiture case did not occur until 1965. In *One 1958 Plymouth Sedan v. Pennsylvania*,[29] the Court determined that a civil forfeiture proceeding in rem, against an automobile seized when its owner was arrested, was actually being brought as an attempt to impose a penalty on the car's owner for the criminal offense of possessing liquor without proper tax seals.[30]

Boyd and *Plymouth Sedan* initiated a "quasi-criminal" doctrine[31] under which courts apply the fourth amendment exclusionary rule in civil actions that bear a sufficient similarity to criminal prosecutions.[32] The full ambit of this doctrine, however, is far from clear. Although the quasi-criminal doctrine at its inception was functionally oriented,[33] it has generally been applied on a perfunctory basis without consideration of the need to protect constitutional interests in facially civil proceedings.[34] Perhaps because the Supreme Court has failed to provide specific guidance on the factors to be considered in determining whether a civil form of action warrants quasi-crim-

28. *Id.*

29. 380 U.S. 693 (1965).

30. *Id.* at 700-02. In this case two state law enforcement officers had unconstitutionally searched an automobile and found 31 cases of liquor not bearing Pennsylvania tax seals. The automobile and liquor were seized; the automobile's owner was arrested. The Commonwealth of Pennsylvania filed a petition for forfeiture of the automobile. The owner sought dismissal of the petition on the grounds that forfeiture of the automobile depended on the admission of unconstitutionally seized evidence. *Id.* at 694-95. Noting that the value of the automobile in question was twice as much as the maximum fine that was the criminal penalty for the offense, *id.* at 700-01, the Court reasoned that it would undermine the purposes of the exclusionary rule to exclude illegally obtained evidence in a criminal prosecution only to admit it in a civil proceeding that allowed imposition of a harsher penalty. *Id.* at 701.

31. *See id.* at 700. The term was alluded to in *Boyd*, 116 U.S. at 634 ("suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature").

32. *See* note 36 *infra*. One commentator has provided the following definition of "quasi-criminal":

> Laws that provide for punishment but are civil rather than criminal in form have sometimes been labeled "quasi-criminal" by the Supreme Court. These laws, broadly speaking, provide for civil money penalties, forfeitures of property, and the punitive imposition of various disabilities, such as the loss of professional license or public employment.

Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 381 (1975) (footnotes omitted), *quoted in* Savina Home Indus., Inc. v. Secretary of Labor, 594 F.2d 1358, 1362 n.6 (10th Cir. 1979).

33. *See* Clark, *supra* note 32, at 384; text accompanying notes 25-30 *supra*.

34. *See* Clark, *supra* note 32.

inal treatment,[35] lower courts have inconsistently treated cases involving the fourth amendment exclusionary rule.[36] The Supreme Court's opinion in *United States v. Janis*,[37] a civil for-

35. The two Supreme Court decisions that have dealt with the "quasi-criminal" doctrine in the context of the fourth amendment exclusionary rule have only discussed the facts then before the Court; neither case provides general guidance on where to draw the line between the merely "civil" and the "quasi-criminal" case. *See* notes 25-30 *supra* and accompanying text.

36. Generally, courts have found the exclusionary rule applicable to proceedings that are quasi-criminal in form. *See, e.g.*, Midwest Growers Coop. Corp. v. Kirkemo, 533 F.2d 455, 466 (9th Cir. 1976) (rule applicable to prevent use of illegal evidence by the ICC in a civil suit); NLRB v. South Bay Daily Breeze, 415 F.2d 360, 364 (9th Cir. 1969) (rule available in a quasi-criminal action, but a case is quasi-criminal in form only if the government is seeking to penalize someone), *cert. denied*, 397 U.S. 915 (1970). Pizzarello v. United States, 408 F.2d. 579, 585-86 (2d Cir.) (tax forfeiture proceeding), *cert. denied*, 396 U.S. 986 (1969); Knoll Associates v. FTC, 397 F.2d 530, 533-37 (7th Cir. 1968) (FTC hearing); Powell v. Zuckert, 366 F.2d 634, 640-41 (D.C. Cir. 1966) (Air Force removal proceeding); Smith v. Lubbers, 398 F. Supp. 777, 794-95 (W.D. Mich. 1975) (civil rights action: determined exclusionary rule is applicable to college disciplinary proceeding); United States v. Blank, 261 F. Supp. 180, 182 (N.D. Ohio 1966) (IRS deficiency assessment proceeding); Lassoff v. Gray, 207 F. Supp. 843, 846-49 (W.D. Ky. 1962) (civil tax assessment); Rinderknecht v. Maricopa County Employees Merit Sys., 21 Ariz. App. 419, 421, 520 P.2d 332, 334 (dismissal proceedings), *vacated after settlement of case*, 111 Ariz. 174, 526 P.2d 713 (1974); Elder v. Board of Medical Examiners, 241 Cal. App. 2d, 246, 260, 50 Cal. Rptr. 304, 315 (1966) (dictum that exclusionary rule is applicable to a proceeding to revoke a medical license), *cert. denied*, 385 U.S. 1001 (1967); Annot., 5 A.L.R.3d 670, 680-83 (1966 & Supp. 1979).

Courts have also applied the exclusionary rule in civil cases by interpreting the exclusionary rule as a constitutional right of the individual and, thus, applicable to both civil and criminal proceedings. In view of recent Supreme Court decisions, however, *see* note 85 *infra*, the premise that the exclusionary rule is a personal constitutional right seems questionable. *See* United States v. McSurely, 473 F.2d 1178, 1193-94 (D.C. Cir. 1972) (legislative hearing cannot order a witness to testify if questions are based on illegally obtained evidence); Roger v. United States, 97 F.2d 691, 692 (1st Cir. 1938) (action to recover duties on imported liquor); *Ex parte* Jackson, 263 F. 110, 112-13 (D. Mont. 1920), *appeal dismissed sub nom.* Andrews v. Jackson, 267 F. 1022 (9th Cir. 1920) (deportation hearing); United States v. Wong Quong Wong, 94 F. 832, 834 (D. Vt. 1899) (deportation hearing); Caldwell v. Cannady, 340 F. Supp. 835, 840 (N.D. Tex. 1972) (high school disciplinary hearing).

In contrast, however, there are a series of cases that have ignored the "quasi-criminal" aspect of the case and have refused to apply the exclusionary rule. These cases are based on the rationale that the public welfare interest involved outweighs any possible further deterrent effect the exclusionary rule's application may have. *See, e.g.*, United States v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (sentencing hearing); United States v. Fitzpatrick, 426 F.2d 1161, 1163-64 (2d Cir. 1970) (parole revocation hearing); *In re* Robert P., 61 Cal. App. 3d 310, 132 Cal. Rptr. 5, 12 (1976) (proceeding to declare minor dependent); Governing Bd. of Mountain View School Dist. v. Metcalf, 36 Cal. App. 3d 546, 551, 111 Cal. Rptr. 724, 727 (1974) (proceeding to dismiss teacher).

See generally 1 W. LAFAVE, SEARCH AND SEIZURE § 1.5(3), at 96-102 (1978); secondary sources cited in note 21 *supra*.

37. 428 U.S. 433 (1976).

feiture case in which the exclusionary rule was not applied, further confuses the issue.[38] *Janis* apparently has led at least one court to conclude that the fourth amendment exclusionary rule is not applicable in any civil case.[39]

In view of the confusion over the full scope of the quasi-criminal doctrine in fourth amendment cases, the exclusionary rule's applicability to OSHA proceedings remains doubtful.[40] Because *Barlow's* was a pre-inspection suit for injunctive relief,[41] the Supreme Court did not determine whether evidence obtained in a warrantless inspection would be admissible in a subsequent administrative hearing. The only appellate court to reach this precise question prior to *Savina* was a panel of the Ninth Circuit in *Todd Shipyards Corp. v. Secretary of Labor*,[42] which, without mentioning the quasi-criminal doctrine by name, characterized OSHA proceedings as civil and concluded that the exclusionary rule should not be applied to OSHA proceedings.[43]

In reaching the opposite conclusion, the *Savina* court noted the quasi-criminal doctrine embodied in *Plymouth Sedan*[44] and observed that "an argument could be made that OSHA civil penalties constitute quasi-criminal sanctions."[45] The court also noted that several lower courts have applied the exclusionary rule in administrative or civil contexts.[46] The court primarily argued, however, that the Supreme Court's rationale for applying the exclusionary rule to criminal cases

38. *See* notes 56-63 *infra* and accompanying text.

39. *See* notes 42-43 *infra* and accompanying text.

40. *See* Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128, 1139 (3d Cir. 1979) (declining to express any opinion "on the sharply contested question whether the exclusionary rule applies to OSHA enforcement").

41. In *Barlow's* the president of an electrical and plumbing business refused to allow an OSHA compliance officer to inspect the nonpublic area of his business. He based his refusal on his fourth amendment rights and the compliance officer's failure to obtain a search warrant. 436 U.S. at 309-10. After a federal district court issued an order compelling Barlow's, Inc. to submit to the inspection, the president again refused, this time seeking injunctive relief from such warrantless searches. *Id.* at 310. The district court held that because the fourth amendment required a warrant for OSHA inspections, OSHA's statutory authorization for warrantless inspections was unconstitutional. Barlow's, Inc. v. Usery, 424 F. Supp. 437 (D. Idaho 1977), *aff'd sub nom.* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). *See* note 12 *supra.*

42. 586 F.2d 683 (9th Cir. 1978).

43. *Id.* at 688-91. *See also* Meadows Indus., [1979] OCC. SAFETY & HEALTH DEC. (CCH) ¶ 23,847 (OSHA REVIEW COMM'N 1979).

44. *See* 594 F.2d at 1362. *See generally* text accompanying notes 29-30 *supra.*

45. 594 F.2d at 1362 n.6.

46. *See id.* at 1362. *See also* note 36 *supra.*

seemed to require its application whenever the underlying purposes of the rule—deterring official lawlessness and preserving judicial integrity—would be advanced.[47] The court emphasized that these considerations "do not become inconsequential simply because an illegal search is conducted by the Department of Labor instead of by the Department of Justice."[48]

The *Savina* court's reasoning illuminates a significant inconsistency in the Supreme Court's application of the quasi-criminal doctrine in fourth amendment exclusionary rule cases. In criminal cases involving exclusionary rule issues the Supreme Court has sought to balance the judiciary's important truth-finding function and its duty to protect constitutional rights.[49] In criminal cases the Supreme Court has almost invariably favored constitutional rights[50] by determining that the exclusionary rule's deterrent effect outweighs its tendency to inhibit the discovery of the truth of the contested matter.[51]

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47. 594 F.2d at 1362 (*citing* Mapp v. Ohio, 367 U.S. 643 (1961)).

48. *Id.* at 1363.

49. In 1914, when the Supreme Court formally adopted the fourth amendment exclusionary rule in federal criminal cases, the Court explained its view of the balance that must be struck in these words:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not be be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Weeks v. United States, 232 U.S. 383, 393 (1914).

In 1961 the Supreme Court favored constitutional rights by extending the exclusionary rule to a state criminal case. In doing so, the Court noted that state remedies other than the exclusionary rule had proven to be "worthless and futile," Mapp v. Ohio, 367 U.S. 643, 652 (1961), and that "we can no longer permit [the fourth amendment] to remain an empty promise." *Id.* at 660.

50. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1960) (extension of the exclusionary rule to state cases); Elkins v. United States, 364 U.S. 206, 223 (1960) (evidence obtained illegally by state officers is inadmissible in federal courts); Rea v. United States, 350 U.S. 214, 217 (1956) (evidence illegally obtained by federal officers could not be used in state courts); Weeks v. United States, 232 U.S. 383, 393 (1914) (adoption of exclusionary rule on federal level). Recent Supreme Court decisions, however, have contained language expressing uncertainty over the desirability of retention of the exclusionary rule as a feature of criminal procedure. *See, e.g.*, United States v. Janis, 428 U.S. 433, 452 n.22 (1976) ("The final conclusion is clear. No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied.") *See also* Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring) ("The time has come to modify [the exclusionary rule's] reach, even if it is retained for a small and limited category of cases."). Despite these reservations, however, the Court has not yet held the rule inapplicable in the simple case in which unlawfully obtained evidence is offered to establish guilt in a criminal trial.

51. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 217 (1960) (in holding that evidence unconstitutionally obtained by state officers was inadmissible in federal criminal prosecutions, the Court stated, "[the exclusionary rule's] pur-

These cases indicate that deterrence of official lawlessness is both the foundation of the rule and a factor of overriding importance in the balancing process.[52] In determining whether the fourth amendment exclusionary rule should apply in cases that are not criminal in form, however, the Court has inconsistently omitted any independent consideration of the rule's deterrent purpose. Instead, the Court has employed the quasi-criminal doctrine and excluded unlawfully obtained evidence only in those civil actions that were punitive in nature.[53] No Supreme Court decision has directly considered whether the rule's deterrent purpose might also be served in civil cases lacking any punitive aspect.[54] Moreover, in *United States v.*

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pose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."). *See also* Stone v. Powell, 428 U.S. 465 (1976) (In holding that exclusionary rule claims could not be raised in federal habeas corpus review, the Court stated: "[t]he primary justification for the exclusionary rule then is the deterrence of police conduct that violates fourth amendment rights . . . ." *Id.* at 486. In this case, however, such deterrence would be minimal, "and the substantial societal costs of application of the rule persist with special force." *Id.* at 495.); United States v. Calandra, 414 U.S. 338, 354 (1974) (In holding that the exclusionary rule is not applicable in grand jury proceedings, the Court stated that "the damage to [the grand jury] from the unprecedented extension of the exclusionary rule . . . outweighs the benefit of any possible incremental deterrent effect.").

52. *See* note 51 *supra*. The Supreme Court has often also referred to the necessity of preserving "judicial integrity" as a purpose of the exclusionary rule. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 394 (1914) (to admit unconstitutionally obtained evidence "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution"). *See generally* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 51 (McNaughton rev. ed. 1961). Despite the view of a few Justices, however, *see* United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting) ("[t]he exclusionary rule . . . accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people . . . that the government would not profit from its lawless behavior"), the "preservation of judicial integrity" appears to be only a secondary benefit of the exclusionary rule's application and not a significant balancing factor in determining whether the rule should be applied in a given case. In recent cases, the Supreme Court has determined that its examination of the good faith of the officer to determine if the exclusionary rule's application will have a deterrent effect is also determinative of whether judicial integrity will be harmed. If the rule's application will have no deterrent effect, then admission of the illegally obtained evidence will not serve to further encourage violations and hence does not harm the court's integrity. *See* United States v. Janis, 428 U.S. 433, 458-59 n.35 (1976). *See also* United States v. Peltier, 422 U.S. 531, 537-38 (1975) (fourth amendment retroactivity); Michigan v. Tucker, 417 U.S. 433, 450 n.25 (1974) (fifth amendment retroactivity).

53. *See* 116 U.S. at 633-34; 380 U.S. at 700-03; notes 25-30 *supra* and accompanying text. *See generally* Clark, *supra* note 32, at 386-87.

54. In United States v. Janis, 428 U.S. 433 (1976), the Court asserted that, "[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding." *Id.* at 447. The issue of application to civil cases, however, was being considered only as an additional

Janis,[55] the Supreme Court's most recent decision on the application of the exclusionary rule in a noncriminal case, the Court failed to give serious consideration to the quasi-criminal doctrine.[56]

The basis of the dispute between the *Savina* and *Todd* courts over the applicability of the exclusionary rule in administrative OSHA hearings is found in their interpretations of the *Janis* opinion.[57] *Janis* involved a federal civil tax forfeiture proceeding in which the IRS sought to introduce evidence of the defendant's unreported and illegal bookmaking receipts that had been unlawfully seized by state police officers.[58] Prior to this federal civil action, the same evidence had been ruled inadmissible in a local criminal prosecution by reason of the fourth amendment exclusionary rule.[59] The Supreme Court, focusing on the deterrence purpose of the exclusionary rule,[60] held that the rule did not apply in the federal civil proceeding.[61] After reasoning that in the local criminal prosecution the exclusionary rule had substantially achieved its deterrent pur-

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factor that, when combined with the intersovereign nature of the fourth amendment violation in question, mitigated against application of the exclusionary rule in that case. *See* notes 58-64 *infra* and accompanying text. The *Janis* Court noted that it was "aware of no study on the possible deterrent effect of excluding evidence in a civil proceeding." 428 U.S. at 452 n.22. Apparently because the precise issue was not then before the Court, however, no attempt at intuitive analysis was made.

55. 428 U.S. 433 (1976).

56. *See* notes 68-71 *infra* and accompanying text.

57. *Compare* text accompanying notes 75-77 *infra with* text accompanying notes 78-81 *infra*.

58. Janis failed to file any federal wagering tax return pertaining to his bookmaking activities. Using evidence illegally obtained by the state police, the IRS assessed Janis for unpaid federal wagering excise taxes under section 4401 of the I.R.C., and levied on cash that had been seized by the state police pursuant to authority granted under section 6331 of the I.R.C., in partial satisfaction of the assessment. 428 U.S. at 437. Janis filed a claim for refund of the cash and, after the government's failure to honor this claim, filed suit in United States District Court in California. *Id.* at 438. The government's claim for the full amount of the assessment was heard as a counterclaim against Janis. *See id.* at 438 & n.5. Finding that "substantially all . . . of the evidence upon which the assessment was based was the result of illegally obtained evidence," Janis v. United States, 73-1 U.S. Tax Cas. (CCH) ¶ 16,083 at 81,393 (C.D. Cal. 1973), *aff'd mem.*, No. 73-2226 (9th Cir. Jul. 22, 1974), *rev'd*, 428 U.S. 433 (1976), the district court ordered that the IRS' civil tax assessment be quashed and dismissed the government's counterclaim with prejudice. *See* 428 U.S. at 439.

59. *See* 428 U.S. at 437-38.

60. *See id.* at 457 n.34 ("The Court has . . . clarified the fact that the primary, if not the sole, function of the exclusionary rule is deterrence."), (citing, United States v. Calandra, 414 U.S. 338 (1974); United States v. Peltier, 422 U.S. 531 (1975)).

61. *See* 428 U.S. at 459-60. *See* text accompanying note 76 *infra*.

pose,[62] the Supreme Court concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion."[63]

The Supreme Court's holding in *Janis* involves two factors. The first factor is the "intersovereign" character of the illegal search: the party that conducted the illegal search and the party that offered the fruits of that search into evidence were separate sovereign entities.[64] The Court reasoned that barring federal authorities from introducing in civil proceedings evidence that was illegally obtained by state officials would not significantly deter state officials from future misconduct because state officials are primarily interested in the outcome of state cases.[65] In earlier cases, however, the Court had held that the deterrence purpose of the exclusionary rule was sufficient to justify the exclusion of evidence seized by the criminal law enforcement officers of one sovereign in the criminal proceedings of another sovereign.[66] Rather than overrule the earlier cases,[67] the *Janis* Court distinguished them by relying on a second factor: the civil nature of the *Janis* tax forfeiture proceed-

62. *See id.* at 448, 453-54 (explaining that the evidence would also be excluded in any federal criminal proceeding: "The additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation.") (footnote omitted).

63. *Id.* at 454.

64. *Id.* at 455-60.

65. *Id.* at 457-58. The Court chastized the respondent, Janis, for his failure to "critically distinguish between those cases in which the officer committing the unconstitutional search or seizure was an agent of the sovereign that sought to use the evidence . . . and those cases . . . where the officer has no responsibility or duty to, or agreement with, the sovereign seeking to use the evidence." *Id.* at 455 (footnote omitted).

66. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 223 (1960) (evidence illegally obtained by state officials is inadmissible in federal criminal proceedings); Rea v. United States, 350 U.S. 214, 217 (1956) (federal courts may enjoin federal agents from using evidence obtained illegally as the basis of testimony in state criminal proceedings). These two decisions put an end to the "silver platter doctrine" under which evidence that was obtained through the fourth amendment violations of one sovereign was freely admissible in the courts of the other sovereign, even though it would be excluded in the courts of the offending sovereign. *See generally* Galler, *The Exclusion of Illegal State Evidence in Federal Courts*, 49 J. CRIM. L. CRIMINOLOGY & POL. SCI. 455 (1959); Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959).

67. *See* 428 U.S. at 448.

ing.[68] Although the civil forfeiture proceedings in *Boyd* and *Plymouth Sedan* appear to be functionally indistinguishable from the proceeding in *Janis*,[69] the *Janis* Court mentioned these cases only in a footnote and, without explanation, characterized the former cases as quasi-criminal and the latter case as civil.[70] Apparently, the *Janis* Court reasoned that exclusion of evidence in a civil case would have less deterrent effect than exclusion of the same evidence in a criminal or quasi-criminal case.[71]

The *Janis* opinion is confusing because the Court failed to explain the relationship between the intersovereign and civil factors. This confusion could have been avoided by indicating the weight that each had been accorded. Moreover, the Court failed to explain the degree to which *Janis* was intended to modify existing law. Although the *Janis* Court relied principally on the intersovereign character of the fourth amendment violation in order to avoid application of the exclusionary rule,[72] it did not overrule prior Supreme Court cases that barred intersovereign use of tainted evidence in criminal prose-

68. *Id.* at 458.

69. In explaining why the exclusionary rule was applied in *Plymouth Sedan* and in *Boyd*, but not in *Janis*, the Court noted that both of the former cases involved "a proceeding for forfeiture of an article used in violation of the criminal law." *Id.* at 447 n.17. This distinction relies on two assumptions: first, that the forfeiture of money is different from the forfeiture of an "article" and, second, that the tax forfeiture involved in *Janis* was not a penalty for violation of the criminal law. On closer examination, however, neither of these assumptions appears convincing.

In *Janis*, the Court did not assert any basis for distinguishing between the forfeiture of money and the forfeiture of an article of value. That there is no reasonable basis for such a distinction is supported by a comparison of lower court decisions involving money and car forfeitures. In both types of forfeitures the majority of courts applied the quasi-criminal doctrine and found unconstitutionally obtained evidence inadmissible in their respective forfeiture proceedings. *See* note 36 *supra*.

The second assumption, that the forfeiture of money in *Janis* was not intended as a penalty for the use of the money in violation of wagering laws, also appears to be logically unsupportable. A tax levied for the purpose of punishing someone for violation of a criminal law is punitive in its effect and, thus, the tax proceeding is quasi-criminal in its nature. *See* Clark, *supra* note 32, at 468. That the wagering excise tax in *Janis* is punitive is clear in that its primary purpose is not to raise revenue but to seek forfeiture of goods used in violation of wagering laws. *See* Marchetti v. United States, 390 U.S. 39, 47 (1967). Thus, the tax forfeiture proceeding, like the civil forfeiture proceeding in *Plymouth Sedan*, "serves as an adjunct to the enforcement of the criminal law." 428 U.S. at 463 (Stewart, J. dissenting). *See generally* Clark, *supra* note 32, at 385-420 (distinguishing punitive and remedial laws in order to differentiate between quasi-criminal and civil cases).

70. 428 U.S. at 447 n.17.

71. *Id.* at 458.

72. *Id.*

cutions. Similarly, although the Court characterized *Janis* as a civil case, the Court failed to repudiate its quasi-criminal doctrine or to explain why it was not applicable to the civil forfeiture proceeding involved in *Janis*. Thus, all that can be stated with certainty is that *Janis* stands for the proposition that the "exclusionary rule should not be extended to forbid the use in [the] civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign."[73] In the Court's view, the intersovereign and civil factors existing in *Janis* operate cumulatively to diminish the deterrent effect of the exclusionary rule to the point where the importance of the truth-finding function of the court outweighs it.[74]

In *Todd*, the Ninth Circuit focused exclusively on the civil nature of the *Janis* case, ignoring its intersovereign aspect. Further, the *Todd* court failed to consider applying the quasi-criminal doctrine. This failure is inexplicable because the *Janis* Court appeared to reassert the doctrine's vitality;[75] and, aside from failing to distinguish *Janis* from *Boyd* and *Plymouth Sedan*,[76] the Court gave no indication of any new limitations on the doctrine's scope. The *Todd* court's citation of *Janis* as authority for the proposition that the Supreme Court has never applied the exclusionary rule in civil cases[77] ignores *Boyd* and *Plymouth Sedan* and misrepresents *Janis*.

Under *Janis*, both the intersovereign and the civil factors must exist in order to render the exclusionary rule inapplicable. In *Savina*, the Tenth Circuit distinguished *Janis* on the basis of its intersovereign aspect and correctly concluded that, although *Janis* manifests the Supreme Court's recent propensity to limit application of the exclusionary rule generally,[78] it does not directly control the issue involved in *Todd* and *Savina*.[79]

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73. *Id.* at 459-60.

74. *See id.* at 458-59 & n.35.

75. *See* note 70 *supra* and accompanying text.

76. *See* notes 68-70 *supra* and accompanying text.

77. *See* Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 689 (9th Cir. 1978).

78. *See* 428 U.S. at 460 (Brennan, J., dissenting) (characterizing *Janis* as a continuation of "the Court's 'business of slow strangulation of the rule' "). *See also* United States v. Peltier, 422 U.S. 531, 550-62 (1975) (Brennan, J., dissenting in a decision that limited the circumstances under which new applications of the exclusionary rule would be retroactive in their application); United States v. Calandra, 414 U.S. 338, 355-67 (1974) (Brennan, J., dissenting in a decision in which the Court refused to extend the exclusionary rule to grand jury proceedings).

79. *See* 594 F.2d at 1362 & n.5.

Although the *Savina* court indicated that OSHA civil penalties could be considered quasi-criminal sanctions,[80] it did not base its decision on the quasi-criminal doctrine. Instead, the court examined the relationship between the exclusionary rule's purposes—preserving judicial integrity and deterring official lawlessness—and the effect that exclusion of evidence would have in OSHA proceedings.[81] This approach was also taken in *Janis*,[82] but never considered in *Todd*. In taking such a functional approach, the *Savina* court implicitly criticized reliance on the quasi-criminal doctrine in fourth amendment exclusionary rule cases;[83] similarity of a particular case to a traditional criminal proceeding appears to be entirely unrelated to the primary purpose of the exclusionary rule and, therefore, to the need to exclude evidence. Criminal and quasi-criminal proceedings both involve important individual interests that deserve a high degree of protection. This fact, however, does not distinguish criminal from civil proceedings for purposes of the exclusionary rule. The evidence potentially subject to exclusion does not become less reliable simply because of the means by which it was procured;[84] thus, to admit the evidence would not frustrate the criminal defendant's right to a fair trial. Admission of the evidence does, however, fail to deter future officials who may attempt an unreasonable search and seizure.

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80. *Id.* at 1362 n.6.

81. *Id.* at 1362-63.

82. *See* text accompanying notes 60-63.

83. 594 F.2d at 1363.

84. In this respect, the operation of the fourth amendment exclusionary rule is unlike the exclusionary rule that accompanies the fifth amendment's guarantee of protection from compelled self-incrimination. *See* U.S. CONST. amend. V. Chief Justice Burger explained the distinction in these words:

> A confession produced after intimidating or coercive interrogation is inherently dubious. If a suspect's will has been overborne, a cloud hangs over his custodial admissions; the exclusion of such statements is based essentially on their lack of reliability. This is not the case as to *reliable* evidence—a pistol, a packet of heroin, counterfeit money, or the body of a murder victim—which may be judically declared to be the result of an "unreasonable" search. The reliability of such evidence is beyond question; its probative value is certain.

Stone v. Powell, 428 U.S. 465, 496-97 (1976) (Burger, C.J., concurring) (emphasis in original).

Because freedom from self-incrimination is a personal, constitutional right of the accused, and because more fundamental personal interests of the accused are usually at stake in criminal and quasi-criminal cases than in civil cases, the quasi-criminal doctrine would appear to be rationally applicable to fifth amendment exclusionary rule cases. *Cf.* Mapp v. Ohio, 367 U.S. 643, 661-66 (1961) (Black, J., concurring) (reading the fourth and fifth amendments together to require state courts to adhere to the fourth amendment exclusionary rule).

The right that exclusion of evidence seeks to protect is that of freedom from such searches and seizures,[85] and parties to civil and criminal actions possess that right to the same degree. The decision to apply the exclusionary rule must, therefore, depend in both instances, as the *Savina* court argues, on a balancing of the dual interests of society in deterring future misconduct by public officials and in punishing parties demonstrated to be liable by the tainted evidence.[86]

The logical implications of the *Savina* court's reasoning indicate that there may often be greater utility in applying the exclusionary rule in civil cases than in criminal cases,[87] a complete reversal of the result reached under the quasi-criminal doctrine.[88] To support this contention, the two sides of the balance that the Supreme Court originally employed to develop the exclusionary rule should be considered. On one side is the public interest in arriving at the truth in a judicial proceeding: the greater the weight on this side of the balance, the more willing a court should be to admit tainted but reliable evidence. On the other side is the public interest in deterring future misconduct in similar situations: the greater the need to deter such conduct, the greater the weight on this side of the balance and the more willing a court should be to exclude probative evidence that was unlawfully obtained.

A noncriminal characterization usually indicates that the legislative branch has scrutinized the behavior in question and has determined that it is not sufficiently detrimental to the public interest to justify criminal penalties. Therefore, it can be assumed that the public need to arrive at the truth in a civil proceeding would usually be less compelling than in a criminal proceeding, in which the public will generally face a greater danger if the criminal escapes liability.[89] Assuming that the ev-

85. Although earlier Supreme Court decisions on the fourth amendment exclusionary rule considered the rule to be an individual's "basic right," *see, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961), more recent Supreme Court decisions have clearly held that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 (1974) (footnote omitted).

86. *See* 594 F.2d at 1362-63; note 82 *supra*; Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1345-46 (1967).

87. *Contra*, Comment, *The Applicability of the Exclusionary Rule to Civil Cases, supra* note 21, at 277.

88. *See* text accompanying notes 25-30 *supra*.

89. *See* Note, *supra* note 86, at 1345 (if there is greater social need to use the evidence in one situation rather than the other, the criminal is the more urgent).

idence to be excluded establishes that the defendant is guilty of a violent crime, the Court's willingness to release a dangerous criminal because the evidence of his crime was obtained by unlawful means,[90] argues, a fortiori, that courts should be even more willing to let a civil defendant, who has violated a less urgent prohibition, escape liability.

While the public need for correct results is less in civil proceedings, the need for deterrence in such proceedings is just as great as in criminal proceedings. Unreasonable and warrantless searches are equally intrusive whether conducted in anticipation of a criminal or a civil proceeding. Although it might be argued that there is a greater need for deterrence in criminal investigations, in which the greater public need to ascertain the truth might cause enforcement officers to conduct a more vigorous investigation, that does not seem to be persuasive in respect to OSHA inspections. Criminal investigations are generally conducted by officers who frequently make such investigations. In the vast majority of cases, it is likely that they are motivated primarily by a desire to carry out their duties competently. OSHA inspectors are similarly motivated in that their exclusive responsibility is to enforce the Act through investigations of employers and places of work.[91] The two sets of government employees would thus appear to have comparable incentives to conduct intrusive searches in the effort to discover violators.[92]

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90. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971) (murder conviction reversed because evidence used against defendant was obtained on the basis of a defective search warrant). Such results explain much of the current criticism of the fourth amendment exclusionary rule. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring) ("Over the years, the strains imposed by reality, in terms of the costs to society and the bizarre miscarriages of justice that have been experienced because of the exclusion of reliable evidence . . ., have led the Court to vacillate as to the rational for deliberate exclusion of truth from the factfinding process."). The danger that such cases present to the public has led one commentator to suggest that the rule should not apply "in the most serious cases—treason, espionage, murder, armed robbery, and kidnapping." Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974).

91. *See also* note 111 and accompanying text.

92. It might also be argued that, apart from the greater public need, there is greater public opinion pressure on police to ascertain the truth in criminal cases that might cause police officers to conduct more rigorous investigations. In most criminal cases, however, the public's awareness of the crime is no greater than it is of most OSHA violations. Many of the major Supreme Court cases concerning the exclusionary rule involved low visibility, nonviolent offenses. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (criminal prosecution for possession of obscene materials); Weeks v. United States, 232 U.S. 383 (1914) (criminal prosecution for using the federal mails to transmit lottery ticket);

Examination of the second articulated purpose behind the fourth amendment exclusionary rule, preservation of judicial integrity,[93] reveals similar arguments for the use of the exclusionary rule in administrative proceedings. Although the quasi-criminal doctrine makes application of the exclusionary rule dependent on the punitive character of the liability that may be incurred, preservation of judicial integrity would be best served by excluding illegally obtained evidence in cases in which the public identifies more strongly with the defendant who was subject to the illegal search. Presumably, the public would therefore perceive injustice more strongly were such tainted evidence admitted. Such defendants would undoubtedly tend to be those guilty of mere civil offenses.[94]

Thus, if courts follow the reasoning of *Savina*, greater use of the exclusionary rule should occur in civil cases.[95] Although this result may initially appear to be contrary to the fourth amendment's historic role, it comports with the original purpose envisioned by the drafters of the amendment. Although the official abuses that gave rise to the fourth amendment did involve searches in criminal investigations, the main impetus for the amendment was the sovereign's intrusions into the business establishments of merchants to confirm full payment of duties owed the Crown.[96]

Boyd v. United States, 116 U.S. 616 (1886) (civil prosecution for failing to declare the importation of thirty-five cases of glass).

Also, in the more serious, violent crimes that generate greater public concern the Supreme Court has allowed certain exceptions to the fourth amendment's warrant requirements to avoid unreasonably restricting the ability of police officers to both promptly and effectively resolve those crimes and remain within constitutional limitations. *See* LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the Quagmire*, 8 CRIM. L. BULL. 9 (1972).

93. *See* note 52 *supra* (in the view of the majority, judicial integrity considerations involve essentially the same inquiry as deterrence purpose considerations).

94. *See* notes 88-90 *supra* and accompanying text.

95. The *Savina* court concentrated on the deterrence value of applying the exclusionary rule to evidence resulting from OSHA searches and did not examine the relative truth-ascertainment costs of excluding evidence in OSHA versus criminal cases. The reasoning in *Savina*, however, would suggest the value of the exclusionary rule in civil cases to have been consistently underestimated. Continued use of *Janis's* balancing should result in wider application of the exclusionary rule in civil cases.

96. The Supreme Court noted this in *Barlow's*, 436 U.S. at 311 (footnotes omitted):

> The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists.

The *Savina* approach to fourth amendment exclusionary rule questions is also important insofar as there has been a transfer of many law enforcement functions from traditional police agencies to other government agencies and officials.[97] This trend is likely to accelerate in the future.[98] In the context of regulatory agencies, applying the exclusionary rule when the purposes of the rule are achieved is a better safeguard of the privacy protections of the fourth amendment than either the *Todd* court's empty classification of the regulatory scheme as either civil or criminal,[99] or the quasi-criminal doctrine.[100] An effective safeguard is necessary because the granting of police search functions to administrative agencies and the increasing regulatory powers of government creates a danger of unwarranted governmental intrusion. In addition, use of the artificial classification system of *Todd* would lead to the anomalous situation "that a man suspected of crime has a right to protection against search . . . without a warrant, [while] a man not suspected of crime has no such protection."[101] By shifting the focus of judicial scrutiny in exclusionary rule cases from the type of case to the purposes of the exclusionary rule, *Savina* ensures that officials in civil proceedings have no greater power to impose upon privacy than have police officials in criminal matters.[102]

Savina may appear out of step with the recent trend to mitigate the apparent harshness of the exclusionary rule. *Savina* represents an expansion of the rule; in contrast, recent Supreme Court cases have tended to limit its scope.[103] The most recent attacks on the scope of the exclusionary rule,[104]

See generally N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 55 (1937).

97. *See generally* Clark, *supra* note 27, at 381-82 & n.6.

98. *See id.* at 381 n.6.

99. *See* notes 42-43, 75-77 *supra* and accompanying text.

100. *See* notes 83-88 *supra* and accompanying text.

101. *See* Frank v. Maryland, 359 U.S. 360, 378 (1959) (Douglas, J., dissenting) (quoting District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950)).

102. *See* text accompanying note 48 *supra*.

103. *See, e.g.*, United States v. Janis, 428 U.S. 433, 459-60 (1976) (*See* text accompanying note 64 *supra*); Stone v. Powell, 428 U.S. 465, 481-82 (1976) ("where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial"); United States v. Calandra, 414 U.S. 338, 342-55 (1974) (a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure).

104. *See, e.g.*, cases cited note 103 *supra*; Friendly, *The Bill of Rights as a*

however, have evinced the same concern for fulfillment of the rule's deterrence purpose that is characteristic of *Savina*.[105] Two examples are the general refusal to extend the rule to exclude evidence illegally obtained through searches conducted by private parties[106] and the criticism of the exclusion of the fruits of intersovereign fourth amendment violations that is implicit in *Janis*.[107] The potential private violator has been

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Code of Criminal Procedure, 53 CALIF. L. REV. 929, 951-54 (1965); Kaplan, note 90 *supra*; LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Wilson & Alprin, *Controlling Police Conduct: Alternatives to the Exclusionary Rule*, 36 L. & CONTEMP. PROB. 488 (1971). *Cf.* Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 429-30 (1974) (criticizing the alternative deterrent schemes of the critics of the fourth amendment exclusionary rule and concluding that the rule is the only practical remedy: "[W]e shall have airings of police searches and seizures on suppression motions or not at all").

105. *See, e.g.*, United States v. Janis, 428 U.S. 433, 458 (1976); Stone v. Powell, 428 U.S. 465, 494-95 (1976); United States v. Calandra, 414 U.S. 338, 351-52 (1974).

106. Evidence illegally seized by private persons is generally admitted into evidence in civil cases between private parties both because the fourth amendment's language has been interpreted to apply only to the acts of government agents, *see* note 16 *supra*, and because the search victim has alternative remedies against a private trespasser that serve the deterrent purpose behind the exclusionary rule with greater efficacy. *See, e.g.*, Drew v. International Bhd. of Sulphite & Paper Mill Workers, 37 F.R.D. 446, 449 (D.C. 1965) (civil suit for breach of employment contract: evidence illegally seized by private employer was admissible); Sackler v. Sackler, 15 N.Y.2d 40, 42, 255 N.Y.S.2d 83, 85, 203 N.E.2d 481, 483 (1964) (evidence of wife's infidelity found by husband when he broke into her home admitted in divorce action); Walker v. Penner, 190 Or. 542, 548, 227 P.2d 316, 318-19 (1951) (holding that trial court erred in excluding evidence illegally obtained by plaintiff's friend in a personal injury action). *But cf.* Williams v. Williams, 8 Ohio Misc. 156, 160, 37 Ohio Op. 2d 224, 227, 221 N.E. 2d 622, 626 (1966) (fourth amendment right was equally applicable against private individuals as it was against the government in a divorce action); Day & Zimmermann, Inc. v. Strickland, 483 S.W.2d 541, 546-47 (Tex. Civ. App. 1972) (under rule 167, Texas Rules of Civil Procedure, it was within judge's discretion to exclude testimony based on unauthorized inspection by plaintiff's witness).

Based on the rationale that the fourth amendment is only designed to restrain government officials from conducting illegal searches and seizures, evidence illegally seized by private persons and then turned over to the government has been admitted even in criminal proceedings. *See, e.g.*, Burdeau v. McDowell, 256 U.S. 465, 476 (1921) (evidence stolen by private individual with no connection to the government was admissible in a criminal prosecution). *See also* NLRB v. South Bay Daily Breeze, 415 F.2d 360, 363-64 (9th Cir.), *cert. denied*, 397 U.S. 915 (1969) (evidence seized by private individual with no connection to the government was admissible in NLRB hearing); United States v. Stonehill, 420 F. Supp. 46, 53 (C.D. Cal. 1976) (evidence seized by Philippine government and private individual without direction or instigation by U.S. officials admissible in civil tax lien case); Comment, *Constitutional Law: Evidence Obtained Through a Private Unreasonable Search and Seizure Inadmissible in a Civil Action*, 46 MINN. L. REV. 1119 (1962); secondary sources cited in note 21 *supra*.

107. *See* notes 58-74 *supra* and accompanying text.

thought to be sufficiently deterred by the availability of a private trespass action to the search victim,[108] and the potential intersovereign violator has been thought to be sufficiently deterred by the knowledge that evidence so gained will be excluded from criminal prosecutions in his own jurisdiction—"the offending officer's zone of primary interest."[109] No such alternative deterrent device, however, exists in the area of OSHA inspections or similar administrative searches. In most cases, the Secretary of Labor and his agents still enjoy sovereign immunity from private trespass suits under the Federal Tort Claims Act,[110] and, in most cases, the warrantless administrative investigator has no motivation other than to enforce a civil penalty in the courts.[111] The deterrence-oriented reasoning of

108. *See* Comment, *supra* note 106, at 1124.

109. United States v. Janis, 428 U.S. 433, 458 (1976); *see* note 65 *supra* and accompanying text.

110. 28 U.S.C. § 2680 (1976). The victim of a warrantless administrative search would presumably have the same right to institute an action to recover damages as the victim of a warrantless criminal search. Section 2680 provides that the exception to sovereign immunity for certain intentional torts applies to "any officer of the United States who is empowered by law to execute searches, [or] to seize evidence" without mention of criminal or civil jurisdiction. Such actions have been brought under the rule of Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971) (recognizing an implied right to damages under the Constitution against individual federal officers found to have conducted an illegal search), *see, e.g.*, Norton v. United States, 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978). Similar suits may be brought under 42 U.S.C. § 1983 (1976). The limitations on such suits, however, have been well documented by the commentators as rendering these actions of little use in all but the most extreme circumstances. *See, e.g.*, Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978); Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights*, 59 MINN. L. REV. 991 (1975); Note, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 TEMP. L.Q. 938 (1976). Perhaps the most severe limitation is the defense that the investigating officer had a reasonable good faith belief that his conduct was lawful. Although never explicitly approved by the Supreme Court, this defense has been uniformly accepted by lower courts, *see* Comment, *Federal Tort Claims Act: Liability of United States for Torts Committed in Good Faith by Federal Law Enforcement Officers*, 63 MINN. L. REV. 1293, 1297 n.21 (1979), despite widespread criticism by the commentators. *See* Newman, *supra*, at 460-62; Theis, *supra*, at 1008-09; Note, *supra*, at 951-55; Comment, *supra*, at 1297 & n.22. None of these criticisms leveled in the criminal context appear any less valid in the context of administrative searches, *see, e.g.*, Amsterdam, *supra* note 104, at 429.

111. In enforcing his congressional mandate "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources," 29 U.S.C. § 651(b) (1976), the Secretary proceeds primarily through civil penalties. *See* 29 U.S.C. § 666 (1976). OSHA provides for criminal sanctions in only three specific circumstances: (1) when any person given unauthorized advance warning of an inspection; (2) when any person knowingly makes a false statement on documents filed in compliance with OSHA regulations; and (3) when a willful violation of OSHA

the most recent cases, therefore, supports the *Savina* result.

No one would seriously assert that the exclusionary rule is the optimal deterrent device. Many have questioned the extent of its deterrent effect.[112] Moreover, the rule carries with it the countervailing evil of allowing wrongdoers to escape liability for their acts. Unfortunately, however, the exclusionary rule is the only practical deterrent device available in a variety of situations,[113] and the majority of the Supreme Court has so far declined to abandon it in those situations in which a deterrent effect is most likely to be present. The *Savina* court has pointed out that an unlawful administrative search resulting in a civil penalty, prosecuted by the same agency that conducted the search, is among the strongest cases for application of the rule. Rejection of the quasi-criminal doctrine and adoption of the *Savina* court's deterrence-oriented analysis would go far toward ensuring the preservation of fourth amendment rights. This result will become more important as administrative searches and civil penalties become more common.

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regulations cause the death of an employee. *Id.* at § 666(e)-(g). None of these circumstances, however, are applicable to the violations found in the *Savina* case. OSHA inspectors, in performing their duties, generally are seeking to enforce OSHA's regulations through civil penalties. Thus, the knowledge that if they unexpectedly uncover evidence of a criminal violation, then that evidence would be inadmissible in a criminal proceeding, appears too remote a likelihood to serve as an effective deterrent.

112. *See, e.g.*, cases cited in note 103 *supra*; articles cited in note 104 *supra; cf.* Brennan dissent cited in note 78 *supra* (lamenting the Court's slow strangulation of the exclusionary rule). *But cf.* Amsterdam, *supra* note 104 (arguing that the exclusionary rule is the only viable method of deterring unlawful searches).

113. *See* Amsterdam, *supra* note 104.